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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES NATHANIEL HICKS, SERGEANT,
UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. May a member of the United States armed forces be constitutionally held to answer before a court-martial charges alleging rape and extortion, when the single act of sexual intercourse forming the basis of such charges, although occurring on a military base, involved as an asserted victim a civilian woman who had knowingly intruded into a prohibited barracks area over a three-day week end and "partied" with enlisted personnel of the base, both before and after the act of intercourse; was not made the subject of a complaint by her until two weeks later; and when the circumstances, as related by her, are susceptible to an inference that she actually consented on the spur of the moment but repented upon reflection?

2. Did a military commander who was potentially subject to adverse criticism for lax weekend supervision of a base under his command cognizance, in consequence of which lax supervision a young civilian white woman who had been "partying" in barracks on the base and off the base with enlisted men, complained that a black sergeant had coerced her into engaging in sexual intercourse with him by threatened disclosure of her acts, thereby become an "accuser" prohibited from convening a general court-martial to try the black sergeant as the solely culpable person?

3. Had a military command commenced "action with a view to trial" prior to the expiration of the enlistment of an enlisted member of the Armed Forces, as required to maintain jurisdiction over that person after expiration of enlistment, when there had been conducted no "preliminary inquiry," as required by regulations in effect at the time, into a relatively simple factual situation, at any time during the period of eight days or more elapsing between the time the alleged facts were brought to responsible command attention and the date of the expiration of the enlistment?

4. Was petitioner denied due process of law when—as a black man charged with rape and extortion in inducing a white woman to engage in sexual intercourse with him in return for his not disclosing the unauthorized presence of the woman in a military barracks bedroom—the prosecution was permitted to introduce over defense objection the testimony of four white women witnesses to the effect that on separate occasions in the past petitioner had sought to obtain sexual favors from each in consideration of his refraining from reporting disciplinary infractions or granting preferential official treatment with respect to the woman or one believed dear to her?

5. Was the petitioner denied the right of confrontation of the sole eyewitness against him when he was not permitted to examine or cross-examine any witness as to sexual activities of a young civilian woman in a military barracks, and with military personnel, over a two-day period prior to an unresisted act of intercourse with the petitioner, which over two weeks later she complained of as having been rape?

6. Was petitioner denied due process of law in being charged with extortion in threatening another with intent "to obtain sexual favors," under a statute which penalizes only threats made with intent to obtain anything of value or an acquittance, advantage, or immunity, not including an intent to make another do an act against that person's will?

7. Was petitioner denied due process of law in being convicted of rape under a statute clearly defining that offense as requiring both force and lack of consent, in the presence of uncontroverted testimony that the alleged victim—a young woman of over twenty years and in full possession of her faculties—not only did not offer any resistance to an act of intercourse, but also did not so much as mildly request the petitioner to desist?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Sergeant Charles Nathaniel Hicks, Jr., United States Marine Corps, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The decision of the United States Navy-Marine Corps Court of Military Review is an unreported decision dated 18 January 1985 and is included as Appendix B. The decision of the United States Court of Military Appeals is published at 24 M.J. 3 (C.M.A. 1987) and is attached as Appendix A.

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED

(i) On 13 April 1987, the United States Court of Military Appeals affirmed the action of a United States Marine Corps general court-martial, as approved by a substituted convening authority, and as affirmed and approved by the United States Navy-Marine Corps Court of Military Review, finding the petitioner guilty of rape and extortion, and sentencing him to confinement at hard labor for thirty years; forfeiture of all pay; reduction

to pay grade E-1; and to be dishonorably discharged from the United States Marine Corps. Although Chief Judge Everett of the United States Court of Military Appeals expressed reservations on the basis of possible application of the doctrine of collateral estoppel to evidence of other acts of misconduct admitted over defense objection, rehearing was not sought as to that issue on the grounds that it was a minute included part of a large Due Process issue, and its decision in isolation would be unlikely to benefit the petitioner to an extent commensurate with the further delay which might be included in a rehearing process.

(ii) A writ of certiorari is sought pursuant to Section 1259 of Title 28, U. S. Code, as added by Section 10 of the Military Justice Act of 1983, approved December 6, 1983, 97 Stat. 1393, 1405-6; Section 2101 of Title 28 U. S. Code, as amended by Section 10 of the Military Justice Act of 1983; and Subsection (h) of Section 867 of Title 10, U. S. Code, as added by Section 10 of the Military Justice Act of 1983.

The second sentence of Subsection (h) (1) of Section 867 of Title 10, providing, in excerpt, "The Supreme Court may not review by a writ of certiorari under . . . [Section 1259 of Title 28] . . . any action of the Court of Military Appeals in refusing to grant a petition for review" has no application to this petition in that the Court of Military Appeals *did* grant the petition for review (October 21, 1985, 21 M.J. 166). The Congress did not intend, and it would not have been constitutionally feasible to limit the review on Writ of Certiorari to *issues* as to which the Court of Military Appeals saw fit to review.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

CONSTITUTIONAL PROVISIONS INVOLVED

(a) Article I, Section 8, Clause 14, empowering the Congress to make Rules for the Government and Regulation of the land and naval Forces.

(b) Article I, Section 8, Clause 18, empowering the Congress to make all laws "necessary and proper" for carrying the granted powers into execution.

(c) Article II, Section 2, constituting the President the Commander in Chief of the Army and Navy.

(d) Article III, Section 1, defining the judicial power of the United Statets.

(e) The Fifth Amendment provision that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury, except in cases arising in the land or naval Forces.

(f) The Fifth Amendment provision that no person shall for the same offense be twice put in jeopardy of life or limb.

(g) The Fifth Amendment provision that no person shall be deprived of life, liberty or property without due process of law.

(h) The Sixth Amendment provision that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed.

(i) The Sixth Amendment provision that in all criminal prosecutions the accused shall enjoy the the right to be informed of the nature and cause of the accusation.

(j) The Sixth Amendment provision that in all criminal prosecutions the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor.

(l) The Sixth Amendment provision that in all criminal prosecutions the accused shall enjoy the the right to have the assistance of counsel for his defense.

The text of pertinent excerpts from the foregoing Constitutional Provisions is set forth in Appendix C.

STATUTES OF THE UNITED STATES INVOLVED

A. Statutes of the United States concerned with the constitution and procedure of general courts-martial

1. *The Uniform Code of Military Justice, ch. 47 of Title 10, United States Code, §§ 801-876, Article 1-76*

(a) Section 801(9)—definition of "accuser"

(b) Section 802(b)—Status of members of a Regular Component as persons "subject to" chapter 47, the Uniform Code.

(c) Section 803(a)—continuation of military jurisdiction with respect to certain offenses.

(d) Section 816(1)—constitution of a general court-martial; provision for trial by military judge alone.

(e) Section 818—Jurisdiction of general courts-martial.

(f) Section 822(a)—authority to convene general courts-martial.

(g) Section 822(b)—Requirement for convening of general court-martial by superior competent authority if commanding officer is an "accuser"

(h) Section 830—Preferring of charges and specifications, and action of "proper authority" thereon

(i) Section 832—requirement of investigation prior to referring charges to general court-martial for trial

(j) Section 836—rule making authority of the President of the United States

(k) Section 866(c)—review responsibility of Court of Military Review

(l) Section 867—Court of Military Appeals

(m) Section 867(h)—review of Court of Military Appeals decisions by United States Supreme Court upon writ of certiorari

(n) Section 870—provision for appellate defense counsel

The text of pertinent excerpts from the foregoing statutory provisions is set forth in Appendix D.

2. ***The Uniform Code of Military Justice ch. 47 of Title 10, United States Code, §§ 877-934 (UCMJ, Articles 77-134)***

§ 920. Art. 120. Rape and carnal knowledge

(a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guility of rape and shall be punished by death or such other punishment as a court-martial may direct.

§ 927. Art. 127. Extortion.

Any person subject to this chapter who communicates threats to another person with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and shall be punished as a court-martial may direct.

§ 934. Art. 134. General article

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial according to the nature and degree of the offense, and shall be punished at the discretion of the court.

3. ***Statutes providing for Supreme Court review by writ of certiorari of cases in which the Court of Military Appeals has granted a petition for review***

The Military Justice Act of 1983, Public Law 98-209, approved December 6, 1983, 97 Stat. 1405:

Sec. 10(a)(1) Chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new section:

§ 1259. Court of Military Appeals, certiorari

Decisions of the United States Court of Military Appeals may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(3) Cases in which the Court of Military Appeals granted a petition for review under section 867(b)(1) of title 10.

(b) Section 2101 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Military Appeals shall be as prescribed by rules of the Supreme Court.

B. Statutes of the United States Respecting Civil Prosecutive Jurisdiction

1. *Under the special maritime and territorial jurisdiction*

Section 7, Title 18, United States Code, paragraph (3): The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Title 18, U.S.C. § 2031. Special maritime and territorial jurisdiction.

Whoever, within the special maritime and territorial jurisdiction of the United States, commits rape shall suffer death, or imprisonment for any term of years or for life.

Title 18, U.S.C. § 872. Extortion by officers or employees of the United States.

Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of extortion, shall be fined

not more than $50,000 or imprisoned not more than three years, or both; but if the amount so extorted or demanded does not exceed $100, he shall be fined not more than $500 or imprisoned not more than one year, or both.

Title 18, U.S.C. § 873. Blackmail

Whoever, under a threat of informing, or as a consideration for not informing, against any violation of law of the United States, demands or receives any money or other valuable thing, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

2. *Under the Assimilative Crimes Act*

Title 18, U.S. Code, § 13. Laws of States adopted for areas within Federal jurisdiction.

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title [defining special maritime and territorial jurisdiction of the United States], is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

STATUTES OF THE STATE OF NORTH CAROLINA UNDER WHICH PETITIONER MIGHT HAVE BEEN PROSECUED

The text of pertinent excerpts from North Carolina statutes is set forth in Appendix E. Included are the statutues pertaining to the offenses of rape and extortion.

The text of pertinent excerpts from the North Carolina "rape shield" statute is set forth in Appendix F.

REGULATORY PROVISIONS GOVERNING COURT-MARTIAL JURISDICTION AND OFFENSES OF RAPE AND EXORTION

A. Manual for Courts-Martial, United States

Executive Order 11430 of 11 September 1968, prescribed the Manual for Courts-Martial. United States, 1969. The Military Justice Act for 1968 (PL 90-632, 82 Stat. 1335) amended the Uniform Code of Military Justice and made it necessary to revise the Manual for Courts-Martial, United States, 1969. Executive Order 11476 of 19 June 1979, prescribed the Manual for Courts-Martial, United States, 1969 (Revised edition), which was in effect at the time of the court-martial trial of petitioner in November, 1983.

The Military Justice Act of 1983 (PL 98-209, Dec. 6, 1983, 97 Stat. 1393) effected substantial amendments in the Uniform Code of Military Justice, many of which were to become effective only on and after 1 August 1984. Executive Order 12473 prescribed the Manual for Courts-Martial, United States, 1984 to become effective on and after 1 August 1984, and provided that the 1969 Revised edition) Manual should be rescinded, effective that date. The Executive Order provided, however, that matter pending as of 1 August 1984 should be completed in accordance with then applicable laws, regulations, and directives, in the same manner as though the 1984 Manual had not been published. All Manuals were prescribed by virtue of the authority vested in the President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code (Uniform Code of Military Justice).

B. Provisions of Manual for Courts-Martial United States, 1969 (Revised edition), in effect at time of general court-martial trial of petitioner and action of Convening Authority thereon:

1. ¶ 11 d—Commencement of "action with a view to trial" prior to expiration of enlistment required for court-martial jurisdiction to attach.

2. ¶ 29 b—Any person subject to Chapter 47 (the Uniform Code of Military Justice) may prefer charges.
3. ¶ 32 e—Duty of immediate commander to make preliminary inquiry into charges or suspected offenses.
4. ¶ 199 a—Definition of rape; requirement of lack of consent.
5. ¶ 206—Definition of exortion. Intent to make a person do an act against his will "may" be included in an intent to obtain an advantage or an immunity.
6. ¶ 53 c. 4), 1984 Manual—An intent to make a person do an act against that person's will is not by itself sufficient to constitute extortion. [No intervening change in the language of the statute interpreted, § 927 of Title 10].

The text of pertinent provisions of the foregoing cited regulatory provisions is set forth in Appendix G.

The Analysis of the abandonment of an intent to make another do an act against that person's will as being sufficient to constitute extortion is in Appendix 21, ¶ 53, page A21-97, of the 1984 Manual:

> ¶ 53. Article 127—Extortion
>
> C. *Explanation.* This paragraph is based on paragraph 208 of MCM, 1969 (Rev.). . . Subparagraph (4) is based on *United States* v. *McCollum*, 33 M.J. 127 (C.M.A. 1982)

The basic factual situation in *McCollum* was that men in a barracks had physically abused another man to coerce him into signing a false statement to the effect that he was an undercover agent for the command, engaged in informing upon any fellow service persons detected in or suspected of trafficking in or using prohibited drugs. The statement would be used against the maker if he were to inform on those who had abused him to obtain it.

The specification under the charge of extortion stated that a threat was communicated "with intent unlawfully to obtain statements against the interests" of the person threatened. A majority of the Court of Military Appeals affirmed the conviction of extortion. Chief Judge Everett dissented, pointing out that whereas some State statutes define the intent in extortion as including an intent to make another do an act against his will, § 927 of Title 10, U.S. Code was not so drafted. The 1984 Manual revision adopted Chief Judge Everett's dissent, stating flatly that without more, an intent to make another do an act against that person's will, will not constitute one who makes a threat for that purpose chargeable with extortion. The 1969 Manual commentary is equivocal, stating only that one intending to make another do an act against his will may under some circumstances be held to have intended to gain an advantage or an immunity, but with no indication as to what such circumstances might be. The principle of construction of equivocal language of regulations against the drafters, coupled with a contemporaneous minority court interpretation subsequently adopted to make the regulatory provisions explicit, would seem to require that petitioner's threat with intent to obtain "sexual favors" not be held to constitute extortion as defined in § 927 of Title 10, U.S. Code.

C. Provisions of the Military Rules of Evidence

Chapter XXVII., Manual for Courts-Martial United States. 1969 (Revised edition)

1. Rule 401—Definition of relevant evidence
2. Rule 403—Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.
3. Rule 404 (b)—Evidence of other crimes, wrongs, or acts generally inadmissible, but may be admitted to show motive, intent, preparation, etc.
4. Rule 412—Nonconsensual sexual offenses; relevance of victim's past behavior.

The text of pertinent excerpts from the foregoing cited regulations is set forth in Appendix H. Rule 412 of the Federal Rules of Evidence, from which Rule 412 of the Military Rules was adapted, is set forth in Appendix I.

STATEMENT OF THE CASE

A young woman, twenty and one-half years of age, took a two-week vacation from her employment in the midwestern town in which she had grown up, going to "open up" a summer house which her parents maintained in the mountains of western North Carolina. Her father was a retired manufacturer who had sold his plant to his employees and left the community, establishing a winter home in Florida and the summer home in North Carolina. His daughter worked as a secretary in the firm which her father had formerly owned, and maintained an apartment, in which at the time she was living alone.

A young man from the same home town with whom the manufacturer's daughter had gone through school had enlisted in the Marine Corps in November, 1982, and in May-June of 1983 was stationed at the Marine Corps Base at Camp Lejeune on the east coast of North Caroline. He was a Lance Corporal (E-3), and his duties included "Mess Hall" (food prepaartion and serving). A Section Leader Supervisor was the petitioner, then a Sergeant (E-5).

On Friday, June 3rd, 1983, the young woman drove from western North Carolina to Camp Lejeune, a distance of over three-hundred bee-line miles, and visited her Marine friend. She went to his bedroom in a barracks, a room which he shared with two other male Marines. That area was prohibited by regulations to civilian female visitors. She was aware that her presence was unauthorized, but no warrant or commissioned officer was seen in the area, and enlisted duty personnel expressed concern in her presence as to nothing more than whether the door to her friend's bedroom should be opened or closed while she was in that room. At no time was

she told that she was not allowed in that area, and instructed as to portions of the Base which she could properly visit with her friend.

On Friday evening the young woman and her friend "partied" about the male dormitory area of the barracks, drinking some alcoholic beverages. She spent that night in bed with her friend. The following morning she met in the barracks and conversed for a time with a Sergeant Carter, who is black. Later that morning, she, her Marine host, and some 4-5 other male Marines, drove in her automobile to Wilmington, North Carolina, from which they spent the rest of the day at a nearby beach. Saturday night was spent at a private home in Wilmington to which one of the Marines had access, the young woman having been said to be the only female in the house.

The young woman's Marine friend had Mess Hall duty from 2:00 to 4:00 p. m., on Sunday, June 5th. The group returned from Wilmington to Camp Lejeune that day, and the young woman again went to her friend's bedroom, leaving her suitcase opened on his bed while she went into the adjoining bathroom and showered.

The record indicates that petitioner came upon the scene for the first time on that Sunday. He is black; lived off the Base with his wife and infant daughter; and his second four-year Marine Corps enlistment was to expire on the 28th of that month. He was twenty-seven years of age at the time; had been captain of his high school football team; and was awarded a scholarship to Tuskegee Institute, which he had declined in favor of enlisting in the Marine Corps. His parents are both educated, middle class, long-term residents of a community near Birmingham, Alabama.

Petitioner was on the Base that Sunday, wearing athletic clothing, not bearing any indication of his status, grade, or of any duty authority. He entered the bedroom of the young woman's friend, perceived the opened suitcase on the bed, and reached in and extracted a brassiere,

which he held up and asked the Marine if he might be a "fag," a slang term for a homosexual male. The Marine stated that the suitcase belonged to his girl friend who was showering in the next room. Petitioner left the room.

After the young woman had finished showering and dressed, she and her Marine friend went to a "catwalk" outside the room and talked together. He was dressed in white clothing, required for the Mess duty he was scheduled to perform from 2:00 to 4:00 that afternoon. He was later seen alone in the hall by petitioner, who told him that he should take his woman friend to Room 330, in that if she were to be found in his room by a duty officer, he would be in real difficulty. The Marine did take the young woman to Room 330, telling her that she should lock the door and admit no one; he would return to get her there after he finished Mess Duty at 4:00 p. m. He had the keys to her automobile, which was parked on the Base.

Room 330 was assigned to three sergeants. Only one, Sergeant Carter, was continuously living in the room at the time. Petitioner used the room as an office when he was on the Base. Sergeant Carter and Petitioner are the only black Marines who figured in the events of that weekend. All other Marines, including the young woman's host, are caucasian, as is the young woman herself.

After the young woman had been in the room alone for a brief period, petitioner knocked on the door, identified himself by his name and grade, stated that 330 was his room, and requested that he be admitted. The young woman opened the door and let him in. Petitioner sat at a desk and wrote on a yellow "legal" pad, asking the young woman questions as to her name, address, and presence on the Base. He was also writing on another sheet of the pad, from time to time seeming to consult a list of Marines whose names were on a poster on the wall. He handed the young woman one of the sheets of paper, which she testified she recollected as stating that her Marine friend, identified by name, had a woman in his room in barracks in violation of Battalion regulations, and as bearing petitioner's signature.

The young woman later testified that petitioner told her that her Marine friend was in real trouble. She asked him what the consequences might be, and recalled his answering that her friend would have to go before officers, lose pay, and perhaps be confined in the brig. He asked her if she would like to see her friend get out of his trouble, and when she responded affirmatively, he said to her, "You [pausing] You for ————'s trouble." He arose from the desk at which he had been sitting, came over to the bed on which she was sitting, took her gently by the hand, and said, "Have we got a deal?" She testified that she did not respond, but rose to a standing position as he took both her hands, not grasping or pulling her. She testified that at this juncture petitioner said to her, "It doesn't matter if you consent or not, I'm going to give it to you anyway."

At no time did the young woman protest; she made no outcry; she was nearer the door to the room than was petitioner; he was not grasping her hands in a manner precluding her eluding him; and she denies any word, gesture, or facial expression that reasonably should have conveyed to petitioner any impression that his attentions were unwelcome.

Petitioner gently led the young woman to another bed in the room; she sat down on the edge of the bed; and petitioner removed a shirt she was wearing. He then helped her to a standing position, and finished undressing her. She lay on the bed on her back as he undressed; petitioner then lay on top of her and performed an act of sexual intercourse. After the act was completed, they both sat on the edge of the bed and conversed, she sitting on one end of the bed, he, on another. She stated that she did not understand much of what petitioner was saying to her, but she did recall that he had suggested that they might live together, saying that her parents would probably be opposed, to which she responded that they would.

Petitioner suggested that the young woman shower in the adjoining bathroom, which she did. He left the room,

and returned a little later with several Marines who had with them a case of beer. The group, comprised of some nine persons including the petitioner and the young woman, sat in a circle about the room and played a drinking game. A collection was taken up by the Marines, and a second case of beer brought in.

Sergeant Carter, who lived in Room 330, and was the only other black person present, is not indicated to have participated in the drinking game. He was in and out of the room several times, and testified that petitioner and the young woman were across from each other in the circle, and that he once saw the young woman cross the circle and appear to speak privately to petitioner.

All other Marines left the room shortly before the young woman's friend was scheduled to return from Mess Duty at 4:00 p. m. Only petitioner and the young woman were in the room when he came to the door. She gave the appearance of having been drinking an alcoholic beverage, and asked him to get her out of there—employing an obscenity. They returned to his room. She testified that he had heard her crying in the bathroom, and came in, whereupon she told him that petitioner had indicated that he might be in trouble for having had her in his room, but that she and petitioner had exchanged hugs and kisses and nothing more.

The young woman stayed in a Holiday Inn that night, and presumably went back to her parents' summer home during the following week. She again drove to Jacksonville the following weekend—June 10-12—and saw her Marine friend, but stayed in a motel and did not come on the Base.

During the work week of June 13-17, the young woman seems to have gone back to her hometown in the midwest. Her father and mother were in town, incident, inter alia, to celebration of her father's birthday, and a brother was with them who stayed in her apartment. The young woman testified that she successively told a girl friend, her brother, a "family friend," and her father and mother what had happened over the June 3-5 weekend. On the

following weekend, June 17-19, she once more drove to Jacksonville, saw her Marine friend, and told him the full story as to the events of the afternoon of 5 June. Her friend took her to the Marine Corps Base on Sunday, June 19th, where she related the story to a commissioned Duty Officer.

Petitioner's second enlistment was to expire at midnight on Tuesday, 28 June 1983. He was given no indication as to what misconduct might be suspected, but was told to remain in his home, stay away from the Base, and report daily to a First Sergeant. The First Sergeant testified that in the course of daily calls made before June 28th, petitioner repeatedly mentioned his "EAS" (Expiration of Active Service, i.e., expiration of term of enlistment), and demanded that the Marine Corps "do something or let me go." The First Sergeant responded only that petitioner would have to wait until "NIS" (Naval Investigative Service) "does something." The First Sergeant stated that he had been told by the Battalion legal officer that petitioner was on "legal hold." No notice was given petitioner prior to the date of expiration of his enlistment that any "action with a view to trial" was being taken in his case, and the record is devoid of any indication that any such action was in fact being taken prior to June 28th. The first such indication was on July 15th—17 days after petitioner's enlistment had expired—when he was ordered into "pre-trial confinement." A pre-trial investigation was held on August 9th, but petitioner did not receive charges properly sworn to as required by statute until 12 September —77 days after his enlistment had expired.

Petitioner was ordered to trial before a general court-martial convened by the Commanding General of the Second Marine Division, headquartered at Camp Lejeune, under date of 13 October 1983, and arraignment and motion proceedings began on November 20th, with open court proceedings scheduled for the week beginning Monday, November 24th. Some 145 days elapsed after the expiration of petitioner's enlistment before he was for-

mally brought before a trial tribunal. One payment was rendered to him in July, but he was later held indebted to the Government for that payment, as he was entitled to no pay or allowances whatsoever subsequent to expiration of his enlistment on June 28th.

Adventitiously, the date of commencement of substantive trial proceedings was Monday, November 24th, the day following the terrorist attack upon U.S. Marine barracks in Beirut, Lebanon, with resulting deaths of 241 Marines. Many of the Marines in Lebanon had been sent there from Camp Lejeune, and some of those slaughtered had family members who were still residing in the vicinity of Camp Lejeune. This factor exacerbated the prejudice against petitioner in a military trial at that time and place. The Military Judge mentioned "the Beirut business" on the record, indicating possible problems that might be presented in proceeding with a trial before a court-martial composed of members.

The Military Judge rejected a defense motion to dismiss the proceeding for lack of personal jurisdiction over the petitioner. Over defense objection, four white women were permitted to testify as to efforts made by petitioner (one successfully, three unsuccessfully) to induce them to engage in intercourse with him. As to two of those women, their complaints had been included in court-martial prosecutions in which the petitioner had been acquitted; the complaints of the other two had been investigated by responsible commands with no record action being taken against the petitioner.

The Military Judge granted a prosecution motion to prohibit the defense—by voir dire, cross-examination of the prosecutrix, or otherwise—from suggesting or inquiring into previous sexual activity of the prosecutrix. The defense proposed that at least it should be permitted that the prosecutrix be examined as to having slept in the same bed with her Marine friend over the night of 3-4 June, the act of intercourse alleged with petitioner having occurred on June 5th, and that the defense was entitled on constitutional grounds to elicit such evidence.

The Military Judge denied such request on the basis of Rule 412 of the Military Rules of Evidence.

Trial before members was scheduled to begin at 1:00 p.m., on Tuesday, November 25th. At 1:14 p.m. on that date, the defense filed a written request for trial before Military Judge alone, which request was granted after examination of the petitioner as to his understanding of its import.

Trial before the Military Judge alone began at 2:40 p.m. on the 25th. Completion of testimony was at 2:13 p.m. on Wednesday, the 26th; summations were completed at 3:17, and at 3:30 the court found petitioner guilty of all charges—rape, extortion, and adultery, although the adultery was recognized as having merged into the rape charge. The court stated that the evidence was considered to establish petitioner's guilt beyond a reasonable doubt, even without the testimony as to prior acts of misconduct by the four white women.

At the sentencing phase, the young woman's father, and the petitioner's father, mother, mother-in-law, and wife testified. Testimony, followed by closing arguments on sentencing, concluded at 4:30 p.m. on Wednesday, 26 November, and the petitioner was sentenced to 30 years confinement at hard labor; forfeiture of all pay; reduction to Pay Grade E-1, and dishonorable discharge from the United States Marine Corps.

The adultery conviction was dismissed upon review by a substituted convening authority (also a Marine Lieutenant General headquartered at Camp Lejeune), but no change was effected in the sentence. The U.S. Navy-Marine Corps Court of Military Review affirmed without change on 18 January 1985, and the United States Court of Military Appeals affirmed upon review on 13 April 1987.

Errors asserted before both the Court of Military Review and the Court of Military Appeals included lack of subject matter and personal jurisdiction, denial of the right of confrontation in prohibiting examination of the prosecutrix as to sexual behavior over 3-5 June (as pos-

sibly tending to raise an inference that she in fact consented to intercourse with the petitioner on 5 June, with the thought of thereby putting her weekend frolic to rest for all time, but upon later reflection decided that she had been duped and sought revenge), permitting the introduction of evidence of prior acts, multiplication of offenses in rape and extortion charges, both part of the same transaction; insufficient evidence to establish that intercourse was accomplished by force and without consent, and inappropriately severe sentence. The Court of Military Appeals refused to grant review as to asserted lack of subject matter and personal jurisdiction, and arbitrary censoring of the appellate defense brief by the Court of Military Review.

ARGUMENT

1. The instant case is one lying beyond that line of demarcation mentioned by Mr. Justice Blackmun in *Relford* v. *Commandant*, of the "area for the civil courts and where the military may not enter." The petitioner here behaved contemptibly, but did not commit rape, nor did he commit extortion. He should have been punished for being a cad, which he was, but not for being a felon, which he was not. A grand jury is an ideal institution for disposing of criminal complaints carrying an emotional overload, through (a) passage of time until the grand jury is convened; (b) having the wiser heads of the community usually performing grand jury duty; (c) having an opportunity to hear complaining witnesses in a confidential atmosphere with unlimited questioning authority; and (d) having the ultimate authority to decline to return a true bill, with no accountability. In contrast, a military authority in a community is perpetually accountable for all that goes on in his domain, and such authority has no shield other than that he or she is precluded by the Constitution from yielding to a hue and cry.

2. The particular convening authority in this instance, the Commander of the Second Marine Division, had the

further concern that if public attention was not kept focused on the petitioner in the pillory, and if anything less than a Draconian punishment were imposed upon the petitioner, the question would be asked as to what sort of military base was being operated—wherein young women had free run of barracks over weekends, and drinking in barracks was rampant? The Commander, whose responsibilities inevitably included the Base housing his personnel and living conditions therein, very definitely had other than a purely objective "official" interest, and the statutory requirement that one so interested pass the convening decision to a superior was designed for just such situations. In this instance, the decision would have been passed to a politically appointed Secretary of the Navy, who, hopefully, might have conferred with the Department of Justice concerning administrative disposition of petitioner's purely military offenses, while leaving the felony prosecution to the civilian experts.

3. The 1984 Manual for Courts-Martial has disposed of the requirement for an immediate "preliminary inquiry" into a complaint of offenses by the commander of the service person complained against, the thinking being that this should be handled by the investigative bureaucracy, the full-time "experts." Much is lost in abandoning the personal touch of the command, but be all of which as it may, the provisions of Paragraph 29 of the 1969 Manual, requiring prompt "preliminary inquiry" in the command, were in full force and effect when the young woman complainant got around to making her complaint less than ten days before the enlistment of petitioner was due to expire. Had the command looked into the matter and discussed it with petitioner, it would have been entirely possible that some agreed extension of enlistment could have been arranged which would have obviated the personal jurisdiction problem. The Naval Investigative Service was not in a position to appreciate such finer points of service personnel administration and preservation of court-martial jurisdiction. The command could have told petitioner that a court-martial trial appeared

to be in the offing, and that felony charges were a distinct probability. Such would have satisfied the regulatory requirements of "action with a view to trial," as a condition of continuing jurisdiction past the expiration of enlistment. It is highly questionable whether telling petitioner that nothing could be done respecting his service status until "NIS" (Naval Investigative Service) did something, and that he would be upon "legal hold" (a term having no statutory basis) until the police investigators got around to his case and made up their minds as to action to be taken, satisfied the "action with a view to trial" criterion.

The practical consequences of indecision in this instance were that petitioner was denied the pay which would have been rendered to another in indistinguishable circumstances but for continuation of his enlistment up to the time of approval of the sentence by the convening authority. Such pay would have made it possible for him to adjust his family affairs, and compensate privately retained counsel who assisted in his defense. His pay situation was in fact in limbo, it being finally held that he was entitled to no pay following the expiration of his enlistment, and that he was obligated to reimburse the Government for a single payment of less than $1,900 which had been rendered to him in July.

4. If the concept of prejudicial effect of evidence outweighing probative value has any meaning, the four white women should not have been permitted to render one-sided accounts of transactions each had with petitioner during periods ranging back as far as three years. There was no way of relitigating these stale issues, and, had there been, petitioner had neither the means nor the time to develop evidence respecting his version. The practical explanation for admitting such extraneous matter is probably that the Naval Investigative Service had gone to considerable trouble to "dig up" this material, and not using it in the instant case, where its only effect could be further to fuel the flames of racial prejudice, might result in the Investigative Service being found less co-

operative in a future case wherein the success of prosecution might hinge upon painstaking investigative spadework.

5. No one would argue that inquiry should have been permitted into the sex life of the young woman complainant over the entire twenty and one-half years of her previous existence. Her activity over June 3 and 4, and the morning and early afternoon of June 5 was pertinent, however, from the standpoint of essaying guesses as to what was going on in the minds both of her and the petitioner at the time the petitioner asked her, "Have we got a deal?" The statement she relates the petitioner made as she was fully cooperating with him, "It doesn't matter if you consent or not, I'm going to give it to you anyway," is so obviously contrived as to be laughable. Had it been made, its probable effect would have been to convert the young woman from a docile tabby into a tigress, rather than to terrify her. How much discreditable activity she may have been involved in during that weekend, and what if any rumors had reached the petitioner, were proper subjects of inquiry for one seeking to arrive at the objective truth as to what went on between them in Room 330? A federal grand jury could and probably would have so inquired.

6. Permitting conviction of felonious extortion upon a complaint of a woman that after voluntarily accompanying a male on a ride in his automobile, she yielded to sexual advances by him by reason of his express or implied threat that she might otherwise be forced to walk on the return trip, would place in the hands of an unscrupulous woman a highly effective and practically unchallengeable weapon for blackmail. Of more pervasive and serious adverse effect, however, would be the counterproductive general tendency as respects seeking equality of treatment for women in all forms of enterprise. In the case of the federal kidnaping statute, it has been held that the words "or otherwise" respecting the intent of the abductor, alone permits conviction of one whose sole intent is to obtain sexual favors. In some States

the words "to make the person do an act against that person's will" serve a similar purpose in extortion statutes. Congress has not seen fit to put such language into the Armed Forces statute, and current Presidential regulations explicitly rule out such an intent as constituting a threatener guilty of felonious extortion, rather than a less serious offense chargeable under the general article.

7. It is unconscionable to prostitute legal principles and precedents to the extent of saying that a young woman who does not so much as say "No," or "Please, don't" to a man who is proposing intercourse, must be deemed to have been put in fear to the extent of having been unable to offer resistance or indicate nonconsent. The 1948 case of *People of California* v. *Cassandras*, 83 Cal. App. 2d 272, 188 Pac 2d 545, went to the fringes of the law in upholding a conviction of rape of a bounder who haunted unemployment offices and lured women emerging therefrom to his hotel room on the pretext of introducing them to an employer who needed workers in fields in which they were experienced. Even under those circumstances, however, the California court relied in upholding the conviction upon the fact that the man had forcibly shoved the victim into his hotel room, after she had perceived that there was no other person in the room and demurred at entering.

Both the 1969 and the 1984 Manual for Courts-Martial unmistakably express the proposition that conviction of rape requires *both* force and lack of consent, and go further to state that even lack of acquiescence may not be conclusive as to lack of consent.

PRAYER

WHEREFORE it is prayed that a writ of certiorari be issued to the United States Court of Military Appeals, in fairness and justice to the petitioner, who continues to serve under a sentence to 30 years confinement at hard labor, and to permit decision of unresolved areas of conflict between military and civilian jurisdiction in general and with respect to construction of federal statutes.

Respectfully submitted,

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APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 52157
NMCM 84 1194

UNITED STATES,

Appellee,

v.

CHARLES N. HICKS, JR., SERGEANT
U.S. MARINE CORPS,

Appellant.

April 13, 1987

OPINION

COX, Judge:

Contrary to his pleas, appellant was convicted by a general court-martial composed of military judge alone of rape, extortion, and adultery, in violation of Articles 120, 127, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 927, and 934, respectively. He was sentenced to confinement for 30 years, forfeiture of all pay, reduction to E-1, and a dishonorable discharge. The convening authority disapproved the findings as to the adultery charge but approved the sentence. The Court of Military Review affirmed in a per curiam opinion. This Court granted review of five issues. 21 M.J. 166. Finding no error prejudicial to the substantial rights of ap-

pellant, we affirm. Art. 59(a), UCMJ, 10 U.S.C. § 859 (a).

The evidence showed that the 20-year-old prosecutrix, Julie P., arrived at Camp Lejeune, North Carolina, on Friday, June 3, 1983, to visit her boyfriend, Private First Class Walter Litteral. Appellant, who was Litteral's section leader, discovered on Sunday afternoon that Julie was staying with Litteral in his barracks room, apparently in violation of a barracks regulation. Apellant informed Litteral that he would be in trouble if the staff duty officer learned that he had a female in his room and suggested that Litteral take Julie to appellant's room to avoid her being discovered. Litteral complied, taking Julie to appellant's room in the barracks and instructing her to lock the door and to admit no one while he was gone to perform mess duty.

Shortly after Julie entered appellant's room, someone knocked on the door and stated that it was Sergeant Hicks and that he needed to get into his room. Julie unlocked the door and appellant entered. He told her that he was in charge of the men whose names were listed on the wall chart. Appellant seated himself at the desk and began to write on a yellow pad, asking her name and where she was from, speaking at all times in a stern and authoritative manner. He told Julie that he was preparing a charge sheet on Litteral. He then tore the sheet of paper from the pad and handed it to her. It stated something to the effect that PFC Litteral had her in the barracks contrary to regulations. When Julie inquired as to the consequences for her friend, appellant answered that Litteral would have to go before officers and lose his pay and privileges and that "he would probably get thrown in the brig."

Appellant asked Julie if she "wanted to get . . . Litteral out of that trouble?" To her response of "Yes, I would," appellant said, "You . . . You, for Litteral's trouble." Appellant then crumpled up the sheet of paper and threw it down. He came over to Julie, took her hand, and asked, "Have we got a deal?" Julie did not

answer. Still holding her hand, appellant said, "It doesn't matter if you cooperate or not, I'm going to give it to you anyway." Julie testified that she realized appellant's intentions at that point and "thought that maybe I could hurt him if I kicked him hard and ran, but I didn't have anywhere to go, and I didn't know anybody, I didn't know where . . . [Litteral] was." She "was scared" and "trembling at that time" and "just stood there." Appellant proceeded to remove her clothing and have sexual intercourse with her. Julie admitted that she offered no resistance, explaining as follows:

> Because I had read articles and seen on talk shows, and I've read articles on rape, and everyone advised that you should never try to fight the man, because you cannot outpower him and if you should not hurt him enough to get away, he'll hurt you back, it will make him mad and he'll hurt you back and the only thing you can do is cooperate.

Julie did not tell anyone of the incident right away, but eventually told her girl friend and brother. She made a formal complaint on June 20.

I.

The first granted issue concerns whether appellant's actions as alleged and proved constitute the offense of extortion under Article 127. The extortion specification alleges as follows:

> Sergeant . . . HICKS, . . . did, . . . with intent unlawfully to obtain sexual favors from Julie . . ., communicate to the said Julie . . . a threat to accuse . . . LITTERAL . . ., of having violated a lawful regulation, to wit: . . . [having] a female . . . in his barracks room in violation of appropriate Barracks regulations.

The offense of extortion is composed of two elements: (1) communication of a threat; (2) "with the intention

thereby to obtain anything of value or any acquittance, advantage, or immunity." Art. 127.

Appellant mantains that communicating a threat with the intent to obtain sexual favors does not satisfy the second element of extortion under Article 127. He posits that the intent to gratify a personal desire is not an "advantage" or "anything of value" under the statute. We specifically reject the suggestion that these statutory terms do not extend to sexual favors or the fulfillment of subjective desires. It is sufficient if there is some "value" or "advantage" to the accused in the thing sought. "Value" and "advantage" are broad concepts and are not limited to pecuniary or material gain. *United States v. McCollum*, 13 M.J. 127, 129-30 (C.M.A.1982). In the instant case, the elements of Article 127 are satisfied both in the allegations and in the proof.

II

The next granted issue concerns whether the evidence is sufficient as a matter of law to convict appellant of rape. Appellant contends that the evidence does not establish that the sexual intercourse was accomplished by force *and* without Julie's consent. The elements of rape are that: (1) the accused committed an act of sexual intercourse with a female; (2) the female was not his wife; and (3) the act of sexual intercourse was done "by force and without her consent." Art. 120(a). "All the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm." Para. 199*a*, Manual for Courts-Martial, United States, 1969 (Revised edition). The force used to accomplish the sexual intercourse may be actual or constructive. *United States v. Henderson*, 4 U.S.C.M.A. 268, 15 C.M.R. 268 (1954); *United States v. DeJonge*, 16 M.J. 974 (A.F.C.M.R. 1983). Furthermore, constructive force may consist of expressed or implied threats of bodily harm. *See United States v. Lewis*, 6 M.J. 581 (A.C.M.R. 1978), *pet. denied*,

6 M.J. 194 (1979); *Maryland v. Rusk*, 289 Md. 230, 424 A.2d 720 (1981); *State v. Hines*, 286 N.C. 377, 211 S.E.2d 201 (1975); *State v. Dill*, 42 Del. 533, 40 A.2d 443 (Trial Court 1944).

Evidence demonstrated that:

(1) Appellant and the victim were not married and, indeed, were not acquainted until the incident in question;

(2) Appellant was in a position of authority over the victim's boyfriend and manipulated the situation to get the victim alone in appellant's room;

(3) Appellant created a coercive atmopshere, threatening to report her boyfriend for a crime if she did not submit to him;

(4) Appellant indicated his intent to use whatever force was necessary to accomplish intercourse by stating, "It doesn't matter if you cooperate or not, I'm going to give it to you anyway;"

(5) Appellant spoke to the victim throughout the incident in a commanding authoritative voice;

(6) The victim was placed in fear of bodily harm; she remembered being advised by various articles and television programs that it was better not to resist unless you are sure you can hurt your assailant to such an extent as to make good your escape; and

(7) The victim was unfamiliar with the area and felt she had nowhere to run for safety.

The existence and reasonableness of the victim's fear of bodily harm under the totality of the circumstances are questions of fact. *See Maryland v. Rusk*, *supra*. The military judge heard the evidence, observed the victim's demeanor, and obviously concluded that appellant's acts were sufficient to reasonably create in the victim's mind —having regard for the circumstances in which she was placed, and her age, size, and mental condition—a genuine fear of bodily harm. As this Court is expressly limited by Article 67(d), UCMJ, 10 U.S.C. § 867(d), "to matters of law," we are precluded from setting aside the

findings of guilty based on insufficiency of the evidence unless there is no competent evidence from which a rational trier of fact could have found beyond a reasonable doubt the existence of every element of the offense. *United States v. Knudson*, 14 M.J. 13 (C.M.A.1982); *United States v. Taylor*, 21 U.S.C.M.A. 220, 44 C.M.R. 274 (1972). *See Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791, 61 L.Ed.2d 500 (1979). In our view, there is sufficient evidence to support the determination below that appellant accomplished the act of sexual intercourse by force and without consent.

III

The third granted issue concerns the denial of a defense motion *in limine* to exclude the testimony of four female witnesses who testified to prior similar acts of extortion by appellant in regard to each of them. Trial counsel offered the evidence under Mil.R.Evid. 404(b), Manual, *supra*, to show motive, intent, state of mind, and plan or scheme. Mil.R.Evid. 404(b) provides:

> *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(a)

Although evidence of other crimes, wrongs, or acts is inadmissible to prove criminal propensity, it may be admissible when it is relevant for another purpose, such as those enumerated in the rule. *Cf. United States v. White*, 23 M.J. 84 (C.M.A. 1986); *United States v. Rappaport*, 22 M.J. 445 (C.M.A. 1986). The military judge admitted the evidence as tending

> to prove a scheme, plan, or modus operandi . . . of the accused to utilize his rank as a noncommissioned officer in conjunction with the military legal system to procure or to coerce submission to dates and/or sexual intimacy with females found or placed in compromising positions.

We cannot say that the evidence of other acts tended to prove only criminal propensity. It was also highly probative of a certain method or scheme employed by appellant to use his position of authority "to orchestrate events" to obtain sexual or monetary favors from vulnerable females. *See Oliphant v. Koehler*, 594 F.2d 547, 553 (6th Cir. 1979). In making his ruling, the military judge conducted on the record the proper analysis and concluded that: (1) the evidence tended to prove that appellant committed prior crimes, wrongs, or acts; (2) the evidence was offered for a proper purpose; and (3) the probative value was not substantially outweighed by the danger of unfair prejudice. *See United States v. White, supra.* We are satisfied that the military judge did not abuse his discretion in so ruling. *See United States v. Brooks*, 22 M.J. 441 (C.M.A. 1986); *United States v. Watkins*, 21 M.J. 224 (C.M.A. 1986).

(b)

Appellant further asserts that the principle of collateral estoppel barred introduction of the testimony of at least two of the witnesses because these women testified to acts of which appellant had been tried by courts-martial and acquitted. This is a question of first impression for this Court. Unfortunately, the only information concerning the acquittals provided in the record of trial is copies of the court-martial orders of the prior trials. They reflect that appellant was acquitted at a special court-martial in October 1980 of extortion, indecent assault, and committing an indecent act involving one witness; and at a general court-martial in March 1982 of

attempted rape, assault with intent to commit rape, and communication of a threat involving another witness.

" 'Collateral estoppel' . . . . means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the *same parties* in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970) (emphasis added). In *Ashe*, the Supreme Court determined that collateral estoppel applies to criminal prosecutions as part of the constitutional prohibition against double jeopardy.* The case involved the robbery of six men while they were playing poker. Several armed men participated and robbed each player. Ashe was tried on a charge of robbing Knight, one of the poker players, and acquitted. Ashe was later brought to trial for the robbery of another player (Roberts) and convicted. The identification testimony at the first trial was weak but the testimony was stronger at the second trial. After examining the record of the first trial, the Supreme Court concluded:

> [T]he record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether . . . [Ashe] one of the robbers. And the jury by its verdict found that he had not. The federal rule of law, therefore, would make a second prosecution for the robbery of Roberts wholly impermissible.
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> * * * *
>
> The question is not whether . . . [Ashe could be charged] with six separate offenses for the robbery of the six poker players. It is not whether he could have received a total of six punishments if he had

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* The Fifth Amendment provides: "No person . . . shall be subject for the same offense to be twice put in jeopardy of life or limb."

> been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that . . . [Ashe] was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again.

Id. at 445, 446, 90 S.Ct. 1195. The issue of identity, which was essential to the second trial, had been resolved in Ashe's favor in the first trial. Applying collateral-estoppel principles, the Court held that the state could not constitutionally subject Ashe to litigation of the issue of identity before a second jury.

The *Ashe* decision left open whether an ultimate issue of fact may be used as an evidentiary fact in a subsequent trial. This has resulted in disagreement among the courts about the extent of the application of the doctrine of collateral estoppel to the evidentiary use of prior acts of which an accused has been acquitted.

Commentators characterize as in the minority the courts that apply a collateral estoppel approach to determine admissibility of evidence which resulted in acquittal at a prior trial. *See* E. Imwinkelried, *Uncharged Misconduct Evidence* §§ 10:03 through 10:07 (1984); Annot., 25 A.L.R. 4th 934 (1983); 2 *Weinstein's Evidence*, para. 404[10] at 404-58 (1982); 22 Wright and Graham, *Federal Practice and Procedure: Evidence* § 5249 at 535-56 (1978). Application of the doctrine of collateral estoppel requires the trial judge

> to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Ashe v. Swenson, 397 U.S. at 444, 90 S.Ct. at 1194 (citations in footnote omitted). The defense has the burden of showing that the acquittal necessarily resolved the issue that the defendant seeks to foreclose from consideration

in the subsequent trial. *Albert v. Montgomery*, 732 F.2d 865 (11th Cir. 1984); *United States v. Johnson*, 697 F.2d 735 (6th Cir.1983); *United States v. Mespoulede*, 597 F.2d 329 (2d Cir.1979).

The majority, and I believe the better, view is that collateral estoppel does not preclude use of otherwise admissible evidence even though it was previously introduced on charges of which an accused has been acquitted. *United States v. Riley*, 684 F.2d 542 (8th Cir.1982), *cert. denied*, 459 U.S. 1111, 103 S.Ct. 742, 74 L.Ed.2d 962 (1983); *United States v. DeVincent*, 632 F.2d 147 (1st Cir.), *cert. denied*, 449 U.S. 986, 101 S.Ct. 405, 66 L.Ed.2d 249 (1980); *United States v. Van Cleave*, 599 F.2d 954 (10th Cir.1979). The questions to be decided are whether the evidence is relevant (Mil.R.Evid. 401) and whether the probative value of the proffered evidence is outweighed by its prejudicial effect (Mil.R.Evid. 403). The relevance of evidence of prior misconduct is governed by Mil.R.Evid. 404(b). In *Ashe v. Swenson*, *supra*, the fact underlying the issue of identity— that is, whether the accused was present at the robbery—was an ultimate fact and essential for conviction in both proceedings. On the other hand, the other-acts evidence here was totally separate from the instant offenses in time and place; was used for a limited evidentiary point; did not require proof beyond a reasonable doubt; and, although probative, was unnecessary to support a conviction of the instant charges.

The general verdict of not guilty returned in criminal cases indicates that the prosecution did not prove every element of the charged crime beyond a reasonable doubt. This is a higher standard than is required for the introduction of other-acts evidence under Mil.R.Evid. 404(b). *See United States v. White*, *supra*. Furthermore, an act does not have to result in criminal liability or even constitute a crime in order to be admissible under Mil.R. Evid. 404(b). The relevance of the act, not its criminality, is important. The fact of the prior acquittal may diminish the probative value of the evidence, however,

and should be considered by the military judge when determining whether "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Mil.R.Evid. 403. *See United States v. Sigal*, 572 F.2d 1320 (9th Cir. 1978); *United States v. Addington*, 471 F.2d 560 (10th Cir. 1973); *United States v. Burkhart*, 458 F.2d 201 (10th Cir. 1972); *United States v. Phillips*, 401 F.2d 301 (7th Cir. 1968).

Even if we were to apply a collateral-estoppel analysis in this case, appellant would not prevail. Because only two of the four witnesses testified to prior acts upon which appellant had been acquitted, the testimony regarding the other two incidents of uncharged misconduct was not affected in any way by the doctrine of collateral estoppel. Further, appellant provided neither the military judge nor this Court with information by which it could be determined what factual issues were necessarily decided in his favor by the prior acquittals. Thus, the defense did not meet its burden of proving that the fact-finder acquitted him because it resolved in his favor the issue that he sought to foreclose from consideration in the instant trial. As the military judge was the trier of fact, he may have rendered the issue moot as to findings by stating on the record: "The court is further of the opinion that the evidence establishes your guilt beyond a reasonable doubt, even without considering the testimony of the four women who complained of similar acts."

In any event, the prior acquittals were factored into the military judge's decision on admissibility. Also, the defense was permitted to bring out the fact of the acquittals in cross-examining the witnesses. We are convinced that the military judge did not abuse his discretion in admitting this evidence.

IV

The Government made a motion *in limine* under Mil. R.Evid. 412 to prohibit the defense from eliciting evidence of the victim's past sexual behavior. When the military judge asked defense counsel his intentions in this regard, the following ensued:

> CC: Your Honor, we intend to introduce evidence or on cross-examining allude to the fact that the victim in this case, Julie . . ., slept with her boyfriend in a barracks room on the evening prior to the time this occurred, in his rack, under the same blankets.
>
> MJ: So what?
>
> CC: Your Honor, there is, in this case, of course, the issue, as there are many, many issues in this case, as to consent. We believe it will be probative of her testimony to show that she consented to sleep with a man in close proximity under the same covers, to show that although she may not be a person of bad sexual moral character, nevertheless, she is not pure as a fresh-driven snow.
>
> MJ: That's the purpose of 412, Mr. Miner. Can you make it relevant, please, sir?
>
> CC: No, Your Honor, I cannot.
>
> MJ: Then it's not admissible.

The above exchange indicates quite clearly that defense counsel failed to even minimally demonstrate that the excluded evidence was relevant, material, and favorable to the defense. *See United States v. Elvine*, 16 M.J. 14 (C.M.A. 1983); *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983). As stated in *United States v. Hollimon*, 16 M.J. 164, 166 (C.M.A. 1983):

> Proof that a woman had sexual intercourse in her room with one male has little tendency to establish that she would also have intercourse willingly in her room with some other male—especially when, as here, there is no indication that . . . [appellant's] encoun-

> ter with the victim was under circumstances similar to those under which she had previously engaged in sexual activity with others.

Accordingly, the military judge properly granted the motion to exclude this evidence.

V

The final issue concerns whether the offenses of rape and extortion are unreasonably multiplicious. There are elements in each offense which are not contained within the other, and neither offense is a lesser-included offense of the other. Paras. 199*a* and 206, Manual, *supra*. The extortion offense was complete upon communication of the threat to report Litteral with the requisite intent; the rape was accomplished by means of placing the victim in fear of bodily harm, *cf. United States v. Hollimon*, *supra*. We find the offenses to be separate for all purposes. *See United States v. Cox*, 18 M.J. 72 (C.M.A. 1984).

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judge SULLIVAN did not participate.

EVERETT, Chief Judge (concurring in part):

Collateral estoppel was not asserted at trial by the defense, when the Government offered evidence of appellant's prior uncharged misconduct pursuant to Mil.R. Evid. 404(b). Consequently, the record of trial does not contain detailed information about the earlier acquittals, so the record does not properly raise this issue. Moreover, the military judge stated specifically that he would have reached his findings of guilty even without the contested evidence of uncharged misconduct.

Certainly, as a matter of settled constitutional law, collateral estopel prevents the Government from relitigating in a later criminal trial issues which previously have been decided in favor of a defendant. *Ashe v. Swenson*,

397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). However, as the principal opinion recognizes, there is divided authority as to whether the prosecution should be allowed to offer evidence of uncharged misconduct of which the accused has been acquitted in an earlier trial. Since the issue of collateral estoppel was first raised by the Court *ex mero motu* during oral argument and is not necessary for decision here, I shall reserve my views thereon until a later case.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 Stovall Street
Alexandria, Va. 22332

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

MATTHEW J. GORMLEY III
JOHN W. KERCHEVAL II
MICHAEL D. RAPP

UNITED STATES

v.

CHARLES N. HICKS, JR., 417 74 8364,
SERGEANT (E-5), U.S. MARINE CORPS

NMCM 84 1194

Sentence adjudged 26 October 1983

Decided 18 January 1985

Review pursuant to Article 66(c), NCMJ

of General Court-Martial convened by Commanding General, 2d Marine Division, FMF, Camp Lejeune, North Carolina 28542

LCDR Harold M. Shaw, JAGC, USN, Appellate Defense Counsel

Homer A. Walkup, Individual Defense Counsel

LT Brian D. Saunders, JAGC, USNR, Appellate Government Counsel

PER CURIAM:

Appellant was found guilty at a general court-martial, military judge sitting alone, of violations of Articles 120, 127 and 134, Uniform Code of Military Justice (UCMJ) (rape, extortion and adultery, respectively). He was sentenced to be confined at hard labor for thirty years, to forfeit all pay (but not allowances), to be reduced in rate to E-1, and to be discharged from the Naval Service with a dishonorable discharge. The supervisory authority disapproved the finding of Guilty to the violation of Article 134, UCMJ, adultery, but approved the findings of guilty to rape and extortion and the sentence as adjudged.

Appellant has raised several issues in his assignments of error and his *Goode* response. Although we find no merit in these issues, we will address several of them briefly.

The evidence presented at trial showed that on 5 June 1983, appellant threatened to use his higher rank and supposed power over the victim's boyfriend to induce the victim to have sexual intercourse with him. Also presented as part of the government's case was testimony that this type of extortion had also been utilized by the appellant in an attempt to gain sexual favors from four other women, all prior to 5 June 1983.

The first issue presented at the court-martial was that of jurisdiction. The appellant was retained on active duty, for the purposes of the court-martial *sub judice*, past the termination of his enlistment contract. There was ample evidence presented to show that the government commenced action with a view towards trial prior

to the appellant's expiration of enlistment date, as required in order to maintain military jurisdiction over a person. Article 2, UCMJ, and Paragraph 11(d), *Manual for Courts-Martial, 1969 (Rev.) (MCM)*. Prior to the expiration of his enlistment, the appellant was informed by his First Sergeant that he would not be discharged at the end of his enlistment period, but would be retained in the military in a "legal hold" status. At that time, the Naval Investigative Service was conducting an investigation into the allegations against the appellant. Approximately a week and a half after the expiration of the appellant's contractual enlistment period, two months after the alleged offenses, an Article 32 investigation was held in this case. It is clear from all of the circumstances that the government was moving forward with an eye towards trial prior to the appellant's expiration of enlistment date. *United States v. Douse*, 12 M.J. 473 (CMA 1982). Therefore, the appellant's assertion that the military had no jurisdiction over him was erroneous.

The appellant then attempted to suppress the testimony of the four women who had previously been subjected to his extortion attempts. This testimony clearly established a recurring plan of conduct on appellant's part. Military Rule of Evidence (MRE) 404. These prior instances were not too remote in time, having occurred within a three year period prior to the trial *sub judice*. Any potential prejudicial impact of the evidence was far outweighed by it probative value. Therefore, the military judge was correct in admitting the testimony. *United States v. Janis*, 1 M.J. 395 (CMA 1976). Even if this Court were to find this evidence inadmissible, the military judge rendered any objections by the appellant moot, stating on the record that the other evidence against the appellant was so overwhelming that he would have found the appellant guilty beyond a reasonable doubt even without the testimony of the four prior "victims".

We specifically find that the military judge was correct in prohibiting the appellant from presenting any evidence on the victim's previous sexual history or conduct. MRE 412. We also find that the two offenses, rape and extortion, were separate offenses and not multiplicious.

In accordance with the above discussion, the findings of guilty and the sentence, as approved on review below, are affirmed.

/s/ Matthew J. Gormley III
MATTHEW J. GORMLEY, III
Chief Judge

/s/ John W. Kercheval II
JOHN W. KERCHEVAL II
Judge

/s/ Michael D. Rapp
MICHAEL D. RAPP
Judge

APPENDIX C

CONSTITUTION

ARTICLE I

Section 8. The Congress shall have Power . . .

(Cl. 14) To make Rules for the Government and Regulation of the land and naval Forces;

(Cl. 18) To make all Laws which shall be necessary and proper for carrying into Execution the Foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

ARTICLE II

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States . . .

ARTICLE III

Section 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without undue process of law . . .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

APPENDIX D

STATUTES OF THE UNITED STATES CONCERNED WITH THE CONSTITUTION AND PROCEDURE OF COURTS-MARTIAL

The Uniform Code of Military Justice, ch. 47 of Title 10, U.S. Code §§ 801-870 (Articles 1-70)

(a) § 801. Art. 1. Definitions

(9) "Accuser" means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

(b) § 802. Art. 2. Persons subject to this chapter

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment . . .

(c) § 803. Art. 3. Jurisdiction to try certain personel

(a) Subject to section 843 of this title (article 43), no person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.

(d) § 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—

(A) a military judge and not less than five members, or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves.

(e) § 818. Art. 18. Jurisdiction of general courts-martial

. . . general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. . . . However, a general court-martial of the kind specified in section 861(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

(f) § 822. Art. 22. Who may convene general courts-martial

(a) General courts-martial may be convened by—

(1) the President of the United States;

(2) the Secretary concerned;

(3) the commanding officer of . . . a division . . . of the Army or Marine Corps;

* * * *

(g)

(b) If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.

(h) § 830. Art. 30. Charges and specifications

(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a

commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that they are true in fact to the best of his knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition shall be made thereof in the interests of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

(i) § 832. Art. 32. Investigation

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters shall have been made. This investigation shall include inquiry as to the truth of the matters set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interests of justice and discipline.

(j) § 836. Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

(k) § 866. Art. 66. Review by Court of Military Review

(a) Each Judge Advocate General shall establish a Court of Military Review . . .

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(l) § 867. Art. 67. Review by the Court of Military Appeals

(a) (1) There is a United States Court of Military Appeals established under Article I of the Constitution of the United States. . . . The court consists of three judges appointed from civil life . . . for a term of fifteen years . . .

(d) In any case reviewed by it, the Court of Military Appeals may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review . . . The court of Military Appeals shall take action only with respect to matters of law.

(e) If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(m)

(h) (1) Decisions of the Court of Military Appeals are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by writ of certiorari under such section any action of the Court of Military Appeals in refusing to grant a petition for review.

(n) § 870. Art. 70. Appellate Counsel

(a) The Judge Advocate General shall detail in his office one or more commissioned officers as appellate Government counsel, and one or more commissioned officers as appellate defense counsel . . .

(c) Appellate defense counsel shall represent the accused before the Court of Military Review, the Court of Military Appeals, or the Supreme Court—

(d) The accused has the right to be represented before the Court of Military Review, the Court of Military Appeals, or the Supreme Court by civilian counsel if provided by him.

APPENDIX E

STATUTES OF THE STATE OF NORTH CAROLINA UNDER WHICH PETITIONER MIGHT HAVE BEEN PROSECUED

STATE STATUTES

GENERAL STATUTES OF NORTH CAROLINA, Ch. 14. Criminal Law

§ 14-1.1. Punishment for felonies occurring on and after July 1, 1981

(a) . . .

(1) A Class A felony shall be punishable by death or life imprisonment . . .

(2) A Class B felony shall be punishable by life imprisonment.

(3) A Class C felony shall be punishable by imprisonment up to 50 years, or by life imprisonment, or a fine, or both imprisonment and fine.

(4) A Class D felony shall be punishable by imprisonment up to 40 years or a fine or both.

* * * *

(8) A Class H felony shall be punishable by imprisonment up to 10 years, or a fine or both;

* * * *

§ 14-27.2. First-degree rape.

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

(2) With another person by force and against the will of the other person, and,

a. Employs or displays a dangerous or deadly weapon.

b. Inflicts serious personal injury . . .

c. . . . commits the offense aided and abetted by one or more other persons.

(b) Any persion who commits an offense defined in this section is guilty of a Class B felony.

§ 14-27.5. Second-degree sexual offense.

(a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:

(1) By force and against the will of the other person . . .

(b) Any person who commits the offense defined in this section is guilty of a Class D felony.

§ 14-118.4. Extortion.

Any person who threatens or communicates a threat or threats to another with the intention thereby wrongfully to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and such person shall be punished as a Class H felon.

§ 14-118.4. Extortion.

Any person who threatens or communicates a threat of threats to another with the intention thereby wrongfully to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and such person shall be punished as a Class H felon.

APPENDIX F

PERTINENT EXCERPTS FROM THE NORTH CAROLINA "RAPE SHIELD" STATUTE

GENERAL STATUTES OF NORTH CAROLINA. Chapter 8. Evidence

§ 8-58.6. Restrictions on Evidence in Rape Cases

(a) As used in this section, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complainant and the defendant; or behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or,

(3) Is evidence of a pattern of sexual behavior closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a maner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the acts or acts charged.

(c) No evidence of sexual behavior shall be introduced at any time during the trial of a charge of rape or any lesser included offense thereof . . . nor shall any reference to any such behavior be made in the presence of the jury, unless and until the court has determined that such behavior is relevant under subsection (b) . . . the court shall conduct an in camera hearing . . .

APPENDIX G

JURISDICTION OF COURTS-MARTIAL

1. ¶ 11. Termination of Jurisdiction

d. Effect of termination of Service. Jurisdiction having attached by commencement of action with a view to trial—as by apprehension, arrest, confinement, or filing of charges—continues for all purposes of trial, sentence, and punishment. If action is initiated with a view to trial because of an offense committed by an individual before his official discharge—even though the term of enlistment may have expired—he may be retained in the service for trial to be held after his period of service would otherwise have expired. Similarly, if jurisdiction has attached by the commencement of action before the effective terminal date of self-executing orders, a person may be held for trial beyond that terminal date . . . [page 4-3] [1]

SUBMISSION OF AND ACTION UPON CHARGES

2. 29. Initiating and Preferring Charges.

a. Who may initiate.

b. Who may prefer. Any person subject to the code may prefer charges . . . In many cases, if the commander who exercises immediate jurisdiction over the accused under Article 15 [Commanding Officer's Nonjudicial Punishment] is not empowered to convene courts-martial and has only an official interest in the disposition of the case, it is customary for him to direct a commissioned officer of his command to make a preliminary inquiry into the suspected offense and to prefer appropriate charges if the facts shown by

---

[1] The 1984 Manual employs the identical criterion of attachment of jurisdiction, i.e., "commencement of action with a view to trial."

the inquiry warrant the preferring of charges . . . [Page 7-1] [2]

3. 32. Action by Commander Exercising Immediate Jurisdiction under Article 15. . . .

b. Preliminary inquiry. He will make, or cause to be made, a preliminary inquiry into the charges or the suspected offenses sufficient to enable him to make an intelligent disposition of them. This inquiry is usually informal. It may be conducted by the commander or by a member of his command. It may consist only of an examination of the charges and the summary of expected evidence which accompanies them. In other cases it may involve a more extensive investigation . . . [7-3] [3]

Chapter XXVIII. Punitive Articles

4. ¶ 199. Article 120—Rape and Carnal Knowledge

a. Rape

Disscusion. Rape is the commission of an act of sexual intercourse by a person with a female not his wife, by force and without her consent . . .

Force and lack of consent are indispensable to the offense. Thus, if the female consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a woman in possession of her mental and physical faculties fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she did in fact consent. Consent, however, will not be inferred if resistance would be futile, or where resistance is overcome by threats of death or great bodily harm, nor will it be inferred if she is unable to

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[2] The 1984 Manual R.C.M. 401, 402, 403, pages II-33 - ii-36, Analysis, page A21-21, omits the requirements of preliminary inquiry and suggestion of immediate preferral of charges on the basis thereof.

[3] Omitted in 1984 Manual.

resist because of the lack of mental or physical faculties . . .

If there is actual consent, although obtained by fraud, the act is not rape . . . [28-47] [4]

5. ¶ 206. Article 127—Exortion

Discussion. Extortion is the communication of threats to another with the intention thereby to obtain anything of value, or any acquittance, advantage, or immunity . . .

. . . An acquittance is a release or discharge from an obligation. An intent to obtain any advantage or immunity may include an intent to make a person do an act against his will. [28-60]

Contrast the provisions of the 1984 Manual regarding the offense of Extortion:

6. ¶ 53. Article 127—Extortion

c. Explanation.

(2) *Threat.* A threat may be communicated by any means . . . The threat may be . . . a threat to accuse the person threatened or any . . . person held dear to that person, of any crime . . . or a threat to do any other harm.

(3) *Acquittance.* An "acquittance" is a release or discharge from an obligation.

(4) *Advantage or immunity.* Unless it is clear from the circumstances, the advantage or immunity sought should be described in the specification. An intent to make a person do an act against that person's will is not, by itself, sufficient to constitute extortion.

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[4] ¶ 45 of the 1984 Manual, pages IV-76 - IV-77, contains substantially indistinguishable provisions.

APPENDIX H

Manual for Courts-Martial United States 1969
(Revised edition)

Chapter XXVII. MILITARY RULES OF EVIDENCE

Rule 101. Scope

(a) *Applicability.* These rules are applicable in courts martial . . .

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) *Character evidence generally.* Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

* * * *

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 412. Nonconsensual Sexual Offenses; Relevance of Victim's Past Behavior

(a) Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of such nonconsensual sexual offense is not admissible.

(b) Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of—

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the nonconsensual sexual offense is alleged.

(c)(1) If the person accused of committing a nonconsensual sexual offense intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall serve notice thereof on the military judge and the trial counsel.

(2) The notice described in paragraph (1) shall be accompanied by an offer of

proof. If the military judge determines that the offer of proof contains evidence described in subdivision (b), the military judge shall conduct a hearing, which may be closed, to determine if such evidence is admissible. At such hearings the parties may call witnesses, including the alleged victim, and offer relevant evidence. In a case before a court-martial composed of a military judge and members, the military judge shall conduct such hearings outside the presence of members pursuant to Article 39(a).

(3) If the military judge determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which a nonconsensual sexual offense is alleged.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempt to commit such offenses.

APPENDIX I

RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES

Rule 412. Rape Cases; Relevance of Victim's Past Behavior

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—

(1) admitted in accordance with subdivisions (c) (1) and (c) (2) and is constitutionally required to be admitted; or (2) admitted in accordance with subdivision (c) and is evidence of—

(A) past sexual behavior with persons other than the accused offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

(c) (1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the trial in which such evidence is offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly

discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of Rule 104 [conditional admission of evidence, subject to later introduction of evidence establishing facts on which the relevancy of the earlier evidence depends], if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.[5]

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[5] Privacy Protection for Rape Victims Act of 1978, PL 95-540, approved October 28, 1978, 92 Stat. 2046. H.R. 4727, introduced by former Congresswoman Holtzman of New York. No Supreme Court-Judicial Conference Advisory Committee Note.

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